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NO. 83-2112

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

IN RE:

DAVID WAYNE COPPIE & BETTY ANN
COPPIE, Debtors;

GORDON E. GOUVEIA, TRUSTEE,
Petitioner,

vs.
HAMMOND CLINIC,
Respondent.

IN RE:

RAY MARVIN McCOWEN, Debtor;

GORDON E. GOUVEIA, TRUSTEE,
Petitioner,

vs.
GENERAL FINANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES
BRIEF OF RESPONDENT

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QUESTION PRESENTED FOR REVIEW

Were the lower courts correct in interpreting Indiana law as holding that monies withheld from a debtor's earnings within ninety (90) days of the debtor's filing a petition in bankruptcy, pursuant to a state garnishment order issued more than ninety (90) days prior to the date of filing a petition in bankruptcy, did not constitute a transfer of property rights, thereby excluding the existence of a preferential transfer as defined in 11 U.S.C. § 547(b)(4)(A) (Supp. II 1978)?

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STATUTES INVOLVED

11 U.S.C. § 547(b)(4)(A) (Supp. II 1978)

provides:

[T]he trustee may avoid any transfer of property of the debtor made on or within ninety (90) days before the date of filing of the petition.

11 U.S.C. § 547(e)(3) (Supp. II 1978), in defining when a preferential transfer occurs, provides:

[A] transfer is not made until the debtor has acquired rights in the property transferred.

Ind. Code § 34-1-11-21 (1976) provides:

From the day of the service of the summons, the garnishee shall be accountable to the plaintiff in the action for the amount of money, property or credits in his hands, or due and owing from him to the defendant.



REASONS FOR DENYING THE WRIT

The Courts below properly applied state law in determining when a transfer occurred.

The preferential transfer provision of the Bankruptcy Code does not address the problem of when a transfer of property has occurred, and the courts below were correct in resorting to state law to make that determination. Two distinct issues arise. First, the court must determine whether the wages garnished within ninety (90) day period were "transferred" by the debtor. Second, if the court finds that a transfer by the debtor was made within the ninety (90) day period, it must then determine whether it was a preferential transfer within the meaning of 11 U.S.C. § 547 (Supp. II 1978).

State law determines when a transfer has occurred since that law property rights are involved. In Re Connor, 733 F.2d 1560, 1562 (11th Cir. 1984); 4 Collier on Bankruptcy ¶ 5478.46 (15th ed.). See also Harbor National Bank of Boston v. Sid Kumins, Inc., 696 F.2d 9, 11 (1st Cir. 1982) (date of attachment of real estate is to be determined by state law).



The wording of Indiana's garnishee liability statute makes it clear that transfer of the debtor's property is completed upon service of the garnishment summons. "From the day of the service of the summons, the garnishee shall be accountable to the plaintiff. . . ." Ind. Code § 34-1-11-21. (emphasis added). Since the garnishee is liable to the creditor upon service of the summons, the transfer is complete upon such service, not upon payment of the actual monies to either the court or the creditor. The Seventh Circuit correctly held that since the issuance of the summons to the garnishee occurred more than ninety (90) days prior to the filing of bankruptcy by the debtor, the transfer of the debtor's property was therefore completed prior to the ninety day preference period. In Re Coppie, 728 F.2d 951 (7th Cir. 1984). Since the debtor had no property interest which was subject to transfer during the preference period, there could not be a "preferential transfer". The wages garnished during the ninety (90) day period could not be avoided by the trustee in bankruptcy. Other



states with similar statutes have reached the same result.

The Eleventh Circuit found a similar result. The court held that since a garnishment order was issued prior to the ninety (90) day preference period, no voidable transfers took place. In Re Conner, 733 F.2d at 1562. The court held that under applicable state law, a transfer occurred on the date the creditor caused the debtor's employer to be served with a summons of garnishment, not when the state court distributed the garnished funds to the creditor. Id. Just like Indiana law, the issuance of the summons in Conner was the point at which a property interest was transferred.

The Second Circuit also found a similar result. Under state statutes very similar to those of Indiana, the court held that there was no preferential transfer when the garnishment order was executed prior to the ninety day preference period. In Re Riddervold, 647 F.2d 342 (2d Cir. 1981). The court used the "continuing levy" theory announced by Judge L. Hand in In Re Sims, 176 F. 645 (S.D. N.Y. 1910)



to determine when a transfer occurred. After the summons was served, "the debtor ha[d] no property or interest in property subject to the levy which can be transferred. Service of the income execution on the employer in effect works a novation whereby the employer owes 10% of the employee's salary not to the employee but to the sheriff for the benefit of the judgment creditor." 647 F.2d at 346. The court of appeals thus used the same rationale as the Seventh Circuit in the instant case.

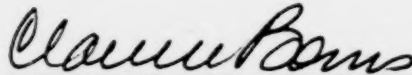
Since the court of appeals correctly held that wages earned and garnished within the ninety (90) days prior to a filing of bankruptcy were not "transferred", under Indiana law, the court did not have to decide upon the applicability of 11 U.S.C. § 547. "Once a garnishment order has been entered by a court, the debtor's rights in 10% of his or her future wages are irrevocably transferred to the garnishment plaintiff". 728 F.2d at 953. There was therefore nothing left which could be transferred.



CONCLUSION

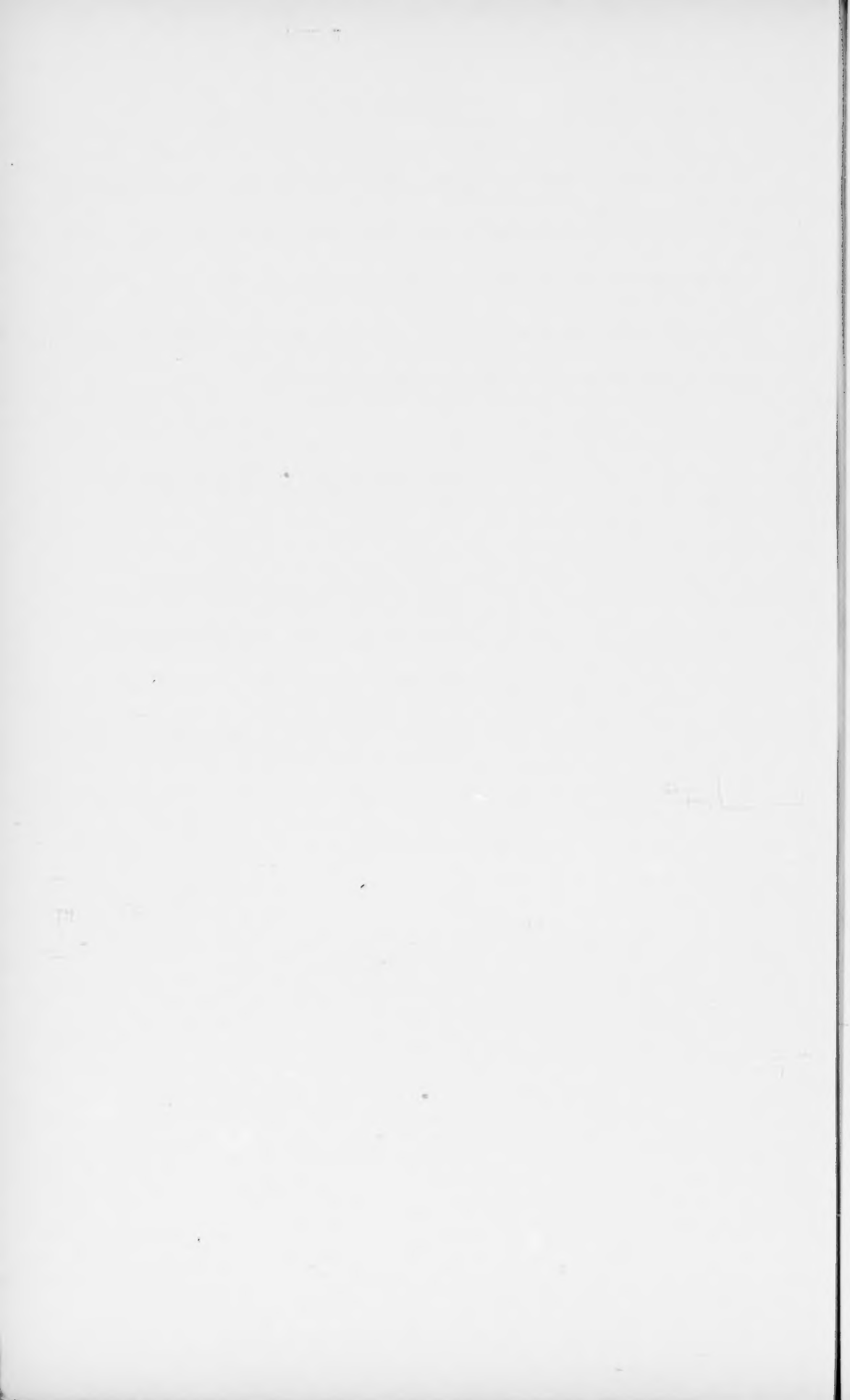
Since the court of appeals correctly interpreted and applied Indiana law as to the occurrence of a transfer pursuant to a state garnishment order, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

A handwritten signature in cursive script, reading "Clarence Borns".

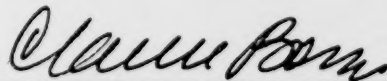
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CERTIFICATE OF SERVICE

I, Clarence Borns, attorney of record for the Respondent herein, hereby certify that on November 29, 1984, service of the original and forty (40) copies of the foregoing Brief in Opposition to Petition for Certiorari to the Supreme Court of the United States was made upon the Supreme Court of the United States, together with three copies of said brief being served upon opposing counsel, Gordon E. Gouveia, by placing same in the United States Mail, in packages properly addressed, certified mail - return receipt requested, and with sufficient first-class postage affixed thereto.



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